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**No. 91-695**

Supreme Court, Ohio  
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IN THE

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**Supreme Court of the United States**

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**October Term, 1991**

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**ISAIAH THOMPSON,**  
*Petitioner,*

vs.

**JANINE THOMPSON,**  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**PETITIONER'S REPLY TO RESPONDENT'S  
BRIEF IN OPPOSITION**

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Respondent has stated that *quid pro quo* sexual harassment is actionable under 42 U.S.C. Sec. 1983 but fails to cite a single case to support this assertion. Respondent relies on the holdings of *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), and *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1987). These cases, however, do not pertain to *quid pro quo* sexual harassment but to a "hostile work environment," which is proscribed by Title VII.

*Quid pro quo* sexual harassment is a type of sex discrimination unique to Title VII. It is not equivalent to a claim of sexual discrimination under the Equal Protection Clause.<sup>1</sup> It is true that Title VII analysis has been used by the courts to examine Constitutional claims. However, these cases do not hold that Respondent or the court may randomly interchange a Title VII claim and a Constitutional claim. A Section 1983 claim "should not proceed solely on the coattails of rights prescribed by Title VII." *Torres v. Wisconsin Dept. of Health & Social Services*, 592 F. Supp. 922, 928 (E.D. Wis. 1984), *affirmed*, 838 F.2d 944 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1587 (1989).

An equal protection violation requires proof of intentional discrimination by reason of membership in a particular class, not merely unfair individual treatment. The offender must have "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney* (1979), 442 U.S. 256, 279, 60 L. Ed. 2d 870. In the present case, there was no evidence at trial that Petitioner selected a particular course of action because of its adverse effects upon women as a class. Respondent's Brief is devoid of

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<sup>1</sup> The amendments to Title VII within the recently enacted Civil Rights Act of 1991 authorize remedial parity between a Constitutional claim of sexual discrimination and a Title VII claim. The amendments eliminate the disparity between the relief available to a party under the Constitution and that available under Title VII. This disparity is evidence of the basic dissimilarities between Constitutional claims and Title VII claims, which was recognized by Congress. Though much of that dissimilarity is now erased by the 1991 amendment, the distinction between the claims was in effect at the time of trial here and should have been recognized by the trial court. The trial court accomplished that which legislation was needed to accomplish. The court converted a Title VII claim into a Constitutional claim by merely requiring proof of intent, an implicit element in a Title VII claim.

reference to any such evidence.<sup>2</sup> The fact is that Respondent did not prove the necessary elements of a Constitutional claim but has obtained such relief in error.

In *Huebchen v. Dept. of Health & Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1988), the Seventh Circuit recognized as had the Second and Fifth Circuits' that enforcing Title VII through Section 1983 should not result in enlargement of the limited substantive relief provided by Title VII itself. Yet, the trial court in the present case has improperly permitted such an enlargement. The trial court has permitted Respondent to recover Title VII relief though she is statutorily excluded from the class of claimants entitled to recover such relief.<sup>4</sup>

This Court has frequently spoken concerning application and exception to Fed. R. Civ. P. 51. This Court has clearly stated that when issues of fundamental fairness and justice appear, it will entertain an appeal from instructions when no objection was made. *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107 (1988). *Barger v. Baltimore*, 616 F.2d 730 cert. denied, 449 U.S. 834 (4th Cir. 1980). Present counsel was not trial counsel for Petitioner and can offer no explanation for the failure to make the appropriate objection. Nonetheless, the trial court dealt extensively with the distinction between Title VII and Fourteenth Amendment discrimination but failed to properly instruct the jury. Unless this Court reviews this issue, the trial court's error will result in fundamental unfairness to Petitioner.

<sup>2</sup> At page 2 of its Brief, Respondent refers to proffered testimony of former employees which was excluded from evidence on the basis of lack of relevancy. Accordingly, the evidence was not subjected to cross-examination or any other test of credibility.

<sup>3</sup> See *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982), and *Carrion v. Yeshiva University*, 535 F.2d 722 (2nd Cir. 1980).

<sup>4</sup> See the exclusion of 42 U.S.C. Sec. 2000e(f).

**CONCLUSION**

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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